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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 493

NATHAN SHAVIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on July 2, 1963.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, affirming the conviction of petitioner, was rendered on July 2, 1963, but has not yet been reported. It is reprinted in the Appendix hereto, p. 1a, *infra*. No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1963. A timely petition for rehearing was denied on July 26, 1963. On August 20, 1963, Mr. Justice Goldberg signed an order extending the time for filing this petition to and including September 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a criminal prosecution for tax evasion under 26 U.S.C. § 7201, the Government in proving its *prima facie* case must take into account all acceptable deductions that it can calculate from records available to it without the assistance of the defendant.

2. Whether, in a criminal prosecution for tax evasion under 26 U.S.C. § 7201, the testimony and summaries of the defendant's summary witness may be completely excluded because of certain errors or deficiencies in his examination of financial records.

3. Whether, in a criminal prosecution for tax evasion under 26 U.S.C. § 7201, the Government must corroborate by substantial and independent evidence the receipt of income as reported in the defendant's tax returns and as detailed in lists supplied by the defendant after the institution of a tax investigation.

4. Whether Rule 41(e) of the Federal Rules of Criminal Procedure requires a federal district court, after the commencement of a trial, to hold a hearing and make a determination as to a motion to suppress where newly discovered facts indicating an unconstitutional seizure of documents arise during a hearing on the timeliness of the motion as originally filed on another basis.

STATUTE AND RULE INVOLVED

This case involves 26 U.S.C. Sec. 7201, which provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Also involved in this case is Rule 41(e), Federal Rules of Criminal Procedure:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant . . . The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT OF THE CASE

A two-count indictment charged that petitioner did wilfully and knowingly attempt to evade a part of his federal income tax obligations, in violation of 26 U.S.C. § 7201, by filing false and fraudulent tax returns for

the calendar years 1954 and 1955.[1] Following a jury trial in the District Court for the Northern District of Illinois, Eastern Division, he was convicted on both counts. Petitioner was then sentenced to serve concurrent prison terms of 18 months on each count, and a fine of $2,500 was imposed on each count, such fines to be cumulative. The Court of Appeals for the Seventh Circuit affirmed the conviction.

1. The Proof As To the Violations of § 7201

The petitioner has been a practicing attorney in Chicago, Illinois, since 1926, specializing in the representation of plaintiffs in personal injury cases. It was his custom in pending cases to pay from his own office funds the various doctor, hospital, garage and repair bills of his clients without waiting for a final settlement or other termination of the particular litigation. App. 145-146, 153, 217, 230. When a case was concluded, the client would come to petitioner's office, sign a release, and receive his share of the settlement from petitioner by check. At this point, petitioner would also pay the fee earned by trial counsel, if the case had gone to trial. Petitioner would then forward the release to the insurance company and receive from it a check covering the full award. The remainder of the amount of this check, after deduction of the foregoing payments, was petitioner's fee for services. Such settlement checks, as received, became a part of petitioner's general office funds. It was from a paper compilation of such transactions that petitioner's tax returns were prepared. App. 289.

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[1] Petitioner and his wife filed joint tax returns. Only petitioner was indicted.

Based upon such compilations, petitioner's tax returns for 1954 and 1955 showed the following figures:

	1954	1955
Gross income: (receipts from settlements, etc.):	$216,106.66	$240,926.76
Business expenses (payments to clients, attorneys, hospitals, doctors, etc., and other office expenses):	—164,272.74	—198,856.30
Deductions and exemptions:	— 18,541.95	— 4,664.90
Net taxable income reported:	$ 33,291.97	$ 37,405.56
Taxes paid:	$ 11,046.00	$ 13,144.95

In 1957 one George Marseille, an Internal Revenue Agent, was assigned petitioner's 1953 income tax return for examination. This examination began in petitioner's office and soon encompassed the 1954 and 1955 returns as well. Petitioner cooperated fully in this examination and supplied Marseille with all of his case files, his cash disbursement books, lists of fees received and work papers for the three years involved.[2] The

[2] Petitioner did not keep his bank deposit slips or cancelled checks. The only retained records of fees and expenses were in the case files which petitioner allowed Marseille to use.

The subsequent indictment made no reference to the 1953 tax return, which had been the original subject of the investigation.

sums of the fees shown on these lists approximated the amounts of $216,107.32 and $240,926.76 shown as gross income on the 1954 and 1955 returns respectively. Govt. Exs. 161, 162, 1, 2.

Almost no effort was made by the Government at the trial to substantiate or corroborate by independent evidence these reported income figures. As to 1954, proof was introduced to support the receipt of fees in the amount of but $12,184.75—or about 5% of the total reported income of $216,107.32. Gov. Ex. 194. As to 1955, the corroboration amounted to $21,673.24—or about 9% of the $240,926.76 reported total. Gov. Ex. 162; App. 355. The remainder of the more than $450,000 of fees reported in these two years was shown solely by reference to lists of named clients and amounts submitted by petitioner after the commencement of the investigation. Although petitioner protested on appeal that the lack of independent corroboration of the receipt of these fees constituted a fatal flaw in the Government's case, the Court of Appeals made no mention of the point.[3]

The Government's proof at the trial was directed primarily at establishing that petitioner had clients other than those indicated in petitioner's lists and that fees were, or should have been, forthcoming from them. A search had been made of various independent records, including court records and the records of insurance companies, for the years in question. App. 100. From this search the Government sought to prove that petitioner had received additional fees that were un-

[3] On appeal a separate "contested issue" was submitted by petitioner in these terms: "2. Whether an extra-judicial admission alone will support a crucial element necessary to proof of the offense charged?" Brief for Appellant in Court of Appeals, p. 13.

reported, making an income understatement of $28,104.50 for 1954 and an understatement of $61,063.91 for 1955. It did so mainly through the testimony of a summary witness, a Revenue Agent named Albert Henkle; he charged petitioner with additional fees of one-third of all the settlements uncovered by the search. See App. 364-370, 385-390. But there was no supporting evidence that petitioner did in fact receive such understated amounts, or that he actually deposited or cashed all the settlement checks in these cases.

Equally critical to the Government's case were the testimony and computations of Marseille. One of his basic assumptions was that petitioner's disbursements and office expenses were simply the amounts shown on Schedule C of petitioner's returns. But Marseille was forced to concede that the 1954 and 1955 cash disbursement books showed expenditures substantially larger than those claimed in the returns. App. 135-136. He further admitted that these were "very good records," App. 122, and that these recorded expenditures "looked acceptable, like ordinary business deductions." App. 28. The disparity in the business expenditure figures as thus revealed by the Government's proof was as follows:

	1954	1955
Amounts conceded to be "acceptable" from the cash disbursement books:	$191,123.74	$200,192.59
Amounts claimed on tax returns:	164,272.74	178,262.73
Additional expenditures thus revealed:	$ 26,851.00	$ 21,929.86

The cash disbursement books in which these additional expenditure figures appeared were prepared and kept by petitioner's bookkeeper, one Louis R. Berk. As a Government witness, Berk showed that each page of these books contained four columns, one of which was headed "Office." App. 163. It was that column that contained the office or business expenditures conceded by Marseille to be "acceptable" and to reflect "very good records."[4] Indeed, Marseille, who had checked these office expense items, testified that he had had copies of the bank statements and thus had checked every expense check to see that it had cleared. App. 126-127.[5]

The other three columns on the pages of the cash disbursement books were headed "Advances", "N.S." (Nathan Shavin), and "Frank" (Frank Hamilton).[6] App. 114. The "N.S." column reflected personal expenses of the petitioner, expenses which were kept entirely separate from the "acceptable" business expenditures posted under the "Office" column. But the fact that the personal expense figures appeared on the same pages as the "Office" expenditures and that some of Berk's testimony referred generally to the pres-

[4] The only item in the "Office" columns of which Marseille was critical was a $25 item charged to investigation. Marseille thought it really was a loan. App. 133.

[5] Marseille made a work sheet, Gov. Ex. 185, for the year 1954 on which he marked off as "O.K." business expense deductions for petitioner in the sum of $180,322.49, which was $18,049.75 more than the deductions claimed in petitioner's 1954 tax return.

[6] Frank Hamilton is an attorney who shares office space with petitioner. They are not partners, although they use the office name of "Shavin and Hamilton." Petitioner pays all office expenses. App. 173, 174, 291.

ence of personal expense items on these pages apparently confused the Court of Appeals, leading to the erroneous statement in its opinion that "some" of the office items "appear on their face to be personal expenses and are not deductible." See p. 5a, *infra*.

As the Court of Appeals noted, see p. 4a, *infra*, deduction of the "Office" expenditures not claimed on the tax returns would have reduced the balance of the alleged 1954 understatement to $43.44 and the balance of the alleged 1955 understatement to $39,108.63. Additionally, the Government's proof showed that some of the insurance company settlement checks—which were used in the Government's computation of unreported income—were not deposited or cashed by petitioner during the tax years in question. These totaled $7,775.00 in 1954[7] and $21,498.40 in 1955. See App. 340, 343, 384, and Govt. Ex. 260.

The trial record, moreover, demonstrated that four trial attorneys who did work for the petitioner during 1955 received a total of $6,193.62 in fees which were not claimed as deductible expenses in petitioner's 1955 tax return.

Based upon all the available records, but without consideration of the "Office" expenditures not claimed or the fees paid to lawyers that were not claimed, yet including settlement checks not shown to have been either deposited or cashed, the Government's summary witness Henkle calculated the understatement of income in 1954 at $28,104.50 and the understatement in 1955 at $61,063.91. App. 340-343. He then computed the

[7] The total uncashed checks for 1954 amounted to $10,825.00, but the Government did not charge to petitioner two of these uncashed checks in the amounts of $1,7500.00 and $1,300.00. Govt. Ex. 260.

corrected tax liabilities in the amounts of $26,987.93 for 1954 and $52,528.02 for 1955. App. 342, 344. These calculations were premised on the assumptions (1) that petitioner was entitled to a one-third fee of all settlements not reflected in petitioner's records, (2) that he actually received and deposited the settlement checks so as to permit him to receive such supposed fees during the tax years, (3) that the gross income from fees reported in the tax returns was fully authenticated and corroborated, (4) that the petitioner had no business expense deductions other than those reported in the tax returns, and (5) that all alleged discrepencies and infirmities in the records were to be resolved against petitioner.

In short, Henkle discriminated against, selected, assumed and eliminated evidence as he saw fit. He did far more than summarize. And his assumptions and calculations were all reduced to writing and introduced as exhibits for the use of the jury. Govt. Exs. 260-262, 270-272. These neat packages of calculations enabled the prosecutor to tell the jury that it need not decide whether there was added income and added tax due; all of this had been done for the jury by the Henkle summaries. Tr. 1969-1979.[8]

When petitioner sought to introduce testimony and summaries of an expert to counter the damaging testimony of Henkle the effort was rebuffed. App. 437-

[8] The charge to the jury merely stated that these summaries "are not actual evidence, but they are admitted as summaries of other evidence in the case, and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize." App. 502. No effort was made to warn the jury with respect to the assumptions underlying the summaries or the resolutions of contested issues reflected in the summaries.

440. The District Court ruled that petitioner's summary witness, Joseph DeLavan, "was not qualified as an expert," App. 437, despite the fact that he was a certified public accountant and a practicing attorney.[9] DeLavan had prepared summaries which took into account the evidence regarding the additional business expense deductions and the deficiencies in proof as to the added income—thereby refuting the conclusions drawn by Henkle as to the alleged understatements of income. Def. Exs. 16, 17, 18. But the District Court, in the presence of the jury, characterized these summaries as "highly unfair" and misleading, sustained the objection to their introduction, and struck all of DeLavan's testimony relating to them. App. 437. Such action was taken, said the District Court, as "a proper exercise of the discretion of the trial court." App. 437.[10] And the Court of Appeals ruled that this discretion

[9] DeLavan was also a member of the Illinois Society of Public Accountants and the American Institute of Certified Public Accountants. App. 393, 396. He had attended all court sessions save one (the testimony of which he read) and heard all the witnesses preceding his own appearance. App. 397.

[10] The District Court also considered DeLavan "loose in his testimony," App. 437, because one of his summaries referred to 1953 items not involved in the case. But that summary, Def. Ex. 18, had merely included a total, from an adding machine tape, of a column from a book already in evidence. App. 410, 417. In any event, the Court of Appeals approved the action of the District Court in permitting the Government to introduce, over petitioner's objection, evidence as to the 1953 return. See p. 10a, *infra*. In light of that fact, DeLavan's incidental reference to some 1953 figures cannot be described as "loose."

The only error appearing in DeLavan's testimony concerned a minor discrepancy of $97.95 in a footing shown by certain books in the record. But this error stemmed from the books themselves rather than DeLavan's summary or testimony. App. 412, 441.

had not been abused since petitioner "failed to make the sufficient proof that these [added] expenses were business expenses, as it was his burden to do." See p. 7a, *infra*.

The Court of Appeals not only approved the exclusion of petitioner's summaries but expressly approved the admission of the Government's summaries. These summaries, said the Court, disclosed the Government's "version of the case, and properly omitted the claimed expenses which the defendant contends should have been deducted." See p. 8a, *infra*.

With respect to the contention that the Government had failed to demonstrate a prima facie tax due for the years 1954 and 1955 because of the failure to take into account the demonstrated additional expenses, the Court of Appeals concluded that (p. 6a, *infra*):

> "The rule which requires the Government to investigate and present evidence upon the claimed deductions applies in the case where the Government proves its case under the net worth theory but not where the proof is made by establishing specific items which were not reported as income as in the instant case."

2. The Denial of the Motion To Suppress

While on the stand during the first day of the trial, Marseille began to testify about certain lists of clients and fees which he said had been copied from lists delivered to him by petitioner. Counsel for petitioner immediately moved, under Rule 41(e) of the Federal Rules of Criminal Procedure, to suppress these lists on the ground that petitioner had not voluntarily delivered them to Marseille. App. 36. The lists were critical to the Government's proof as to income received by petitioner from fees.

The District Court excused the jury and held a hearing limited to a determination of the timeliness of the motion. It concluded, and the Court of Appeals later concurred, that under the circumstances petitioner or his counsel must have been aware of the grounds for the motion—as it was first framed—long prior to trial; hence the motion was held to be untimely under the provisions of Rule 41(e).

During the hearing, however, certain new facts were revealed that altered the whole thrust of the motion to suppress. These facts assumed critical importance in light of a prior indictment and prosecution of petitioner for mail fraud. On November 5, 1956—preceding the institution of the tax inquiry—petitioner had been indicted on charges of defrauding insurance carriers by use of the mails. Petitioner, in submitting medical bills to the insurance companies in connection with settlement negotiations on behalf of clients, allegedly altered and raised the medical fees actually charged by the doctors. A jury was unable to agree to a verdict at the first trial in 1959. A second trial in 1960 resulted in a conviction on two counts, but the cause was reversed and remanded for a new trial by the Court of Appeals for the Seventh Circuit. *United States* v. *Shapiro*, 287 F.2d 647. The then remaining counts of the mail fraud indictment were dismissed on the Government's motion, however, after the tax evasion indictment was returned.

At the instant hearing on the motion to suppress, Marseille gave additional testimony. He there revealed several significant facts theretofore unknown to petitioner or his counsel: (1) the fact that Marseille, in his investigation of petitioner's files, was particularly

interested in the records involving doctors' bills, records which went to the very heart of the then pending mail fraud case;[11] (2) the fact that Marseille at this time (1957) was in close contact and collaboration with the criminal or intelligence division of the Internal Revenue Service;[12] and (3) the admission that Marseille had deliberately concealed from petitioner and his counsel any information concerning these contacts with the intelligence division.

Upon learning these facts, petitioner's counsel amplified the original motion to suppress. App. 86-87. A request was made for a full hearing to determine the extent to which Marseille had been working with the intelligence division and to determine the extent to which Marseille's search of petitioner's files in March of 1957 was really an effort to discover evidence for the mail fraud trial. The District Court refused to permit such a broadened inquiry, insisting that the only matter at stake was the timeliness of the motion to

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[11] In Gov. Ex. 185, one of the exhibits petitioner sought to suppress, Marseille had listed 85 items relating to doctors' bills. App. 101. Marseille conceded that such listings were not for purposes of calculating possible business expense deductions. App. 102.

[12] Particularly ominous and left unexplained was a note dated March 15, 1957, in Marseille's handwriting, referring to a conference he had had with his superior and with two agents of the intelligence division. App. 60. The note stated in part that the conference had "resulted in agreements that I should continue the investigation and examine case files to determine gross fees and reconcile differences. It was thought because of indictment that Mr. Nathan Shavin would be more or less non-cooperative to go along with it." Def. Exs. 1b and 13. The only indictment outstanding at the time this note was written was the mail fraud indictment.

suppress.[13] Finding the motion in its original form to be untimely, the court denied the motion. App. 93. Thus the effort to expand the motion, in light of the new information developed at the hearing, to inquire into the broader constitutional problems of search and seizure was entirely frustrated.

The Court of Appeals likewise ignored the attempt to expand the motion to suppress. It simply affirmed the District Court's action in denying as untimely the motion in its original form "at the time it was presented." See p. 10a, *infra*.

REASONS FOR GRANTING THE WRIT

1. IMPORTANT QUESTIONS IN THE ADMINISTRATION OF THE CRIMINAL TAX EVASION STATUTE HAVE BEEN RESOLVED BY THE COURT BELOW IN A MANNER CONFLICTING WITH THE STATUTORY DEFINITION OF A CRIME AND WITH THE RELEVANT DECISIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS.

The focus of this case is the language of 26 U.S.C. § 7201, which imposes criminal penalties on "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof." The crime thus defined is one of tax evasion or understatement of tax obligations. *United States* v. *Johnson*, 319 U.S. 503, 515.[14] And a prerequi-

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[13] While the District Court reiterated that the hearing was confined to the timeliness question, it nonetheless found that the delivery of the lists was voluntary on petitioner's part. That was the issue raised in the original form of the motion before amplification.

[14] "But no prosecution for *willful attempt to evade or defeat a tax* is possible unless there is some tax due." 10 Mertens, Law of Federal Income Taxation, § 55A.06 (1958); emphasis in original. And as noted in *United States* v. *Gordon*, 242 F. 2d 122, 125 (C.A. 3), "The filing of a false report or return is not even an essential element of the crime."

site to a determination of a tax evasion or understatement "is the establishment of taxable income." *Small* v. *United States,* 255 F.2d 604, 606 (C.A. 1). Proof is therefore essential "to show that *full and proper returns* would have resulted in larger tax obligations than those shown in the returns actually filed." *Jones* v. *United States,* 282 F.2d 745, 74[illegible] (C.A. 4); emphasis added.

The court below, however, ignored or misconceived the fundamental nature of a § 7201 crime. It has held that the Government, in a specific item case, need not take into account unclaimed but "acceptable" business expenses discovered in the Government's investigation without the aid of the taxpayer. It has held that a mere showing of unreported receipts—quite apart from their setting in a reconstructed "full and proper" return—is enough to convict one of failing to pay a tax due and owing. And it has held that this petitioner is precluded from rebutting such failure to prove an unpaid tax obligation through the presentation of an expert witness. As a result, the principles utilized in affirming petitioner's conviction are at war with the statutory concepts, with the guidelines established by this Court and by other federal appellate courts, and with the principles of fair judicial procedure.

A. The Conflict As To the Government's Duty To Develop and Calculate Known Deductions

The court below, in approving the prosecution's failure to develop and calculate other known business expense deductions available to petitioner, held that the Government's duty to investigate and present evidence upon the claimed deductions "applies in the case where the Government proves its case under the net worth

theory but not where the proof is made by establishing specific items which were not reported as income as in the instant case." See p. 6a, *infra*. The essence of the ruling is that, in a specific item case, the Government need only show unreported income in satisfying its burden of proving that a full and proper tax return would have resulted in larger tax obligations.

Such a holding is completely inconsistent with the statutory concept that the proof of the tax understatement must come from a calculation of the tax due on a full and proper return. A full and proper return, of course, means a return reflecting not only all known receipts of income but all known deductions. In other words, the Government in proving its *prima facie* case must show not only unreported income but must allow "the deductions claimed by the defendant in his return and others that it can calculate without his assistance." *Elwert* v. *United States*, 231 F. 2d 928, 933 (C.A. 9). As stated in *Beck* v. *United States*, 298 F. 2d 622, 632 (C.A. 9), a *prima facie* case is established only after "the government proves unreported receipts by a taxpayer, has allowed all deductions claimed in the taxpayer's return, [and] has allowed all deductions developed and discovered in the government's investigation." Accord: *United States* v. *Link*, 202 F.2d 592, 593 (C.A. 3); *United States* v. *Smith*, 206 F.2d 905, 910 (C.A. 3); *United States* v. *Stayback*, 212 F. 2d 313, 317 (C.A. 3). The square conflict between the decision below and those of the Ninth and Third Circuits in these cases warrants plenary review of the problem by this Court.

This burden of calculating and allowing deductions that have been discovered without the assistance of the

defendant is one that applies in any tax evasion case, be it a net worth case or a specific item case. It is a burden different and distinct from the Government's duty in net worth cases to "track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked." *Holland* v. *United States*, 348 U.S. 121, 135-136. And it is a burden unlike that which shifts to the defendant to prove that he had other allowable deductions which were not shown on his return and which were not discovered by the Government's investigation.[15] What the court here overlooked was the Government's statutory responsibility, in proving its *prima facie* case, of reconstructing the fullest and most proper return possible from the evidence available to the Government without assistance from the defendant. Only after such a reconstruction can there be *prima facie* proof of a tax understatement.

In this case the Government had available to it, without aid or leads from the petitioner, evidence from its investigation of petitioner's records, evidence which indicated that substantial business expense deductions had not been claimed on the tax returns. Concededly, these expenses appeared to be "acceptable" and were traceable to "very good records." Had they been utilized in the Government's reconstruction of the proper tax returns, the balance of the income understatements for the two tax years would have approached the vanishing point and the impact on the jury would

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[15] "Once the Government establishes unreported income of the defendant and allows deductions claimed by him in his tax return and others that it can calculate without his assistance, the burden is on the defendant to prove that he had other allowable deductions which were not shown on his return." 10 Mertens, Law of Federal Income Taxation, § 55A.27, p. 107 (1958).

have been incalculable. Combined with other deficiencies in the Government's proof, such a reconstruction might well have convinced the jury of petitioner's innocence.

The obvious and continuing importance of this problem, together with the irreconcilable conflict between the decision below and the aforementioned decisions of the Ninth and Third Circuits, makes appropriate the grant of certiorari.

B. The Conflict As To the Exclusion of Petitioner's Summary Evidence

The ruling of the court below that the District Court, while properly admitting the summaries of the Government's expert, did not abuse its discretion in striking all the testimony and written summaries of petitioner's summary witness directly conflicts with the principles established by this Court in *United States* v. *Johnson*, 319 U.S. 503, and with the decisions in *United States* v. *Caserta*, 199 F.2d 905 (C.A. 3), and *Myres* v. *United States*, 174 F. 2d 329 (C.A. 8).

Trial judges have broad discretion in matters of admission and exclusion of expert evidence, *Spring Co.* v. *Edgar*, 99 U.S. 645, 648, but this discretion is not unlimited, particularly where the subject of the expert's testimony is not within the common understanding and comprehension of the jury members. Cf. *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35. Especially must such discretion be circumscribed where, as here, the vital issue in the trial, and the one to which the experts address themselves, involves the reconstruction of complicated financial data and the computation of the tax consequences arising therefrom.

The premise of this exclusion of summary evidence was twofold: (1) the petitioner had failed to prove that the additional expenses were business expenses; and (2) the summary witness had failed to check properly certain items in his summaries. See p. 7a, *infra*. The first point is misplaced, since the Government witnesses had conceded that these items were "acceptable" business expenses. App. 28. The books in which these disbursements had been recorded were compiled in the usual and ordinary course of business; thus they were competent under the "shop book" statute, 28 U.S.C. § 1732. The problem was one of demonstrating the error of the Government's failure to take these expenses into account in reconstructing the "full and proper" tax returns. The second point relied upon by the Court of Appeals at best goes to the weight and sufficiency of the witness' testimony, not to its admissibility.[18] Indeed, to exclude such testimony because of some supposed defects therein is to invade the province of the jury and to deprive petitioner of his right to present his version or analysis of the complicated financial data for the jury's consideration.

It is precisely at this point that this Court's opinion in the *Johnson* case becomes controlling. The rejection of petitioner's summary evidence was based on what this Court condemned in *Johnson*—the assumption "that juries are too stupid to see the drift of evidence" and the notion that the jury otherwise "must accept

[18] Cf. the tolerant ruling of the District Court with respect to objections to the testimony of the Government's summary witness (App. 357): ". . . it may well be that a witness makes errors in summarizing, errors in making computations as a result of erroneous summaries, but it seems to me that an objection along that line, if there is any . . . goes to the weight of the document."

the calculations of the . . . [petitioner's] expert any more than that they were bound by the calculations made by the . . . [Government's] expert based on the . . . [Government's] assumptions of the case." 319 U.S. at 519. Exclusion thus becomes improper, under the *Johnson* view, so long "as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's." *Ibid.*

As expressly held in *United States* v. *Caserta*, 199 F. 2d 905, 908-909 (C.A. 3),

> . . . if the government is to be permitted to endeavor to establish a taxpayer's criminal responsibility through expert testimony, the privilege of combatting that testimony by expert testimony on his side is open to the defendant. This is a matter of common fairness and common sense—the defendant is entitled to an expert witness on any points on which the prosecution was entitled to the use of expert testimony.

And as held in *Myres* v. *United States*, 174 F. 2d 329, 336 (C.A. 8), there is

> . . . no reason why a jury should be deprived of any assistance that an expert witness can give. Whether the views of . . . [the Government witness] or those of . . . defendant's expert, as to proper exclusions or inclusions in computing the defendant's income taxes for the years in suit were to be accepted, was for the jurors to decide for themselves.

Denial of petitioner's right to present a summary witness, in the circumstances of this case, was a denial of what the Third Circuit called "common fairness and common sense" and has created what this Court warned

against in *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 244—"a one-way street" in the fair administration of justice. To the extent that determination and computation of both income received and deductions allowable was a jury function, such a denial foreclosed to the jury an important facet of information and analysis appropriate to an intelligent resolution of the financial issues.[17] The conflict that has arisen over this important question warrants review by this Court.

C. The Conflict As To the Corroboration Necessary As To Petitioner's Admissions

In *Smith* v. *United States*, 348 U.S. 147, 155, this Court held that the rule requiring corroboration of a defendant's extra-judicial admission applies to tax evasion cases, at least where "the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element vital to the Government's case." Such corroboration, as was made clear in *Opper* v. *United States*, 348 U.S. 84, 93, "must consist of substantial evidence, independent of the accused's extra-judicial statements."

In the instant case the petitioner had shown on his returns gross income in 1954 of $216,107.32 and gross income in 1955 of $240,926.76. It thus became essential, in demonstrating a *prima facie* case, for the Government to prove that such income had in fact been received during the years in question. And it attempted to do so through certain lists detailing the sources of this income, lists which the District Court found had

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[17] See, generally, Balter, Fraud Under Federal Tax Law, p. 448 (2d ed., 1953); 10 Mertens, Law of Federal Income Taxation, § 55A.22, p. 89 (1958).

been delivered by petitioner to the tax investigators. Except for independent corroboration to the extent of $12,184.75 in 1954 (5% of the total) and $21,673.24 in 1955 (9% of the total), these lists constituted the sole proof of income to the petitioner in excess of $450,000.00.

The attempt to corroborate these lists to the extent of 5% and 9% is feeble indeed. And the lists are readily identifiable as a key part of the case. The understatements of income as alleged by the Government witnesses and as affirmed by the Court of Appeals amounted to 10% and 20% of the gross income during the respective years. Much thus remained unproved by independent evidence. As the Court said in the *Smith* case, 348 U.S. at 155, "An admission which assumes this importance in the presentation of the prosecution's case should not go uncorroborated."

The vital nature of these lists in the presentation of the prosecution's case is clear. Equally clear is the substantial failure to corroborate those lists or admissions by independent evidence.[18] The refusal of the Court of Appeals to insist upon such corroboration, a matter which was urgently pressed upon it, directly conflicts with this Court's rulings in the *Smith* and *Opper* cases and justifies corrective review action by this Court.

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[18] Cf. *Alker v. United States*, 260 F. 2d 135 (C.A. 3). That case involved a lawyer-defendant charged with having understated his income from fees. But the corroboration of the receipts was close to 100% and such corroboration took the form of independent evidence, such as cancelled checks, vouchers and testimony of witnesses.

2. AN IMPORTANT QUESTION IN THE ADMINISTRATION OF CRIMINAL PROCEDURE RULE 41(e) HAS BEEN RAISED BY THE DECISION BELOW.

The holding that petitioner's motion to suppress was untimely under Rule 41(e), despite the development at the hearing of previously unknown grounds for the motion, raises a most serious problem in the administration of criminal justice in the federal courts.

Rule 41(e) provides that a motion to suppress the use of property illegally seized "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." Acting under the last clause of the Rule, the District Court here exercised its discretion to entertain the motion during the trial. But the motion was entertained only in its original form and, on the basis that the grounds for the motion as originally made had been long known to petitioner or his counsel, the motion was denied as untimely.

Completely overlooked by both the District Court and the Court of Appeals was the effort to amplify the motion on the basis of testimony revealed at the hearing, testimony as to facts not previously known to petitioner and completely unrelated to the grounds underlying the motion as first made. Indeed, the facts which came to the attention of petitioner at this hearing were of a most serious nature; they indicated the possibility of an illegal or unconstitutional search having been made of petitioner's records, in collaboration with intelligence officers, in order to uncover evidence of a mail fraud crime unrelated to the tax inquiry. If that possibility were borne out, substantial questions as to the validity of such a search by stealth and deceit and the admissibility of the seized documents would be

present. See *Gouled* v. *United States*, 255 U.S. 298; *Nardone* v. *United States*, 308 U.S. 338.[19]

To preclude consideration of an amplified motion addressed to such critical problems and to premise a denial of the motion on the untimeliness of the original version is to rigidify Rule 41(e) into "a narrow, finicky procedural requirement"—a requirement rejected by this Court in *Jones* v. *United States*, 362 U.S. 257, 264. Where important rights under the Fourth and Fifth Amendments may be at stake, "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." *Gouled* v. *United States*, 255 U.S. 298, 313; and see *Agnello* v. *United States*, 269 U.S. 20, 34-35.

Where, as here, facts come to light which warrant a motion to suppress on constitutional grounds, a proper interpretation of Rule 41(e) would permit and indeed require a hearing on that motion at the time the defendant is first made aware of the grounds. See *Amos* v. *United States*, 255 U.S. 313, 316-317. What was said in *Gouled*, 255 U.S. at 312-313, with respect to an analogous procedural rule then in effect, is equally appropriate to Rule 41(e):

> While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the

[19] See *United States* v. *Lipshitz*, 132 F. Supp. 519 (E.D.N.Y.), and *United States* v. *Wheeler*, 149 F. Supp. 445 (W.D. Pa.), relative to the validity of a search by revenue agents for evidence relating to another crime. As was said in the *Wheeler* case, 149 F. Supp. at 450, "To secure evidentiary matter without making such disclosure when [other] criminal wrongdoing is suspected constitutes a fraud and deceit upon the taxpayer in violation of his constitutional rights and his right against self-incrimination."

> circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

As was said in *Gallegos* v. *United States*, 237 F. 2d 694, 697 (C.A. 10), the discretion contemplated by Rule 41(e) "should be liberally exercised in the furtherance of justice."

So vital is this problem in the administration of criminal justice and so contrary is the result below to the principles of the *Gouled* case that review of the matter by this Court is both appropriate and essential.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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